FILED
AUG 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1569

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

RICHARD H. AUSTIN,
Michigan Secretary of State,
and FRANK J. KELLEY,
Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF
COMMERCE, a non-profit Michigan
Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

GARY P. GORDON
RICHARD P. GARTNER
Assistant Attorneys General
Attorneys for Appellants

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	
I THIS CASE IS GOVERNED BY FEDERAL ELECTION COMMISSION V. MASSACHUSETTS CITIZENS FOR LIFE, INC.	1
II SECTION 54(1) IS NOT SUBSTANTIALLY OVERBROAD	7
III SECTION 54(1) OF THE CAMPAIGN ACT IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	11
A. Section 54(1), Which Distinguishes Between Corporate Entities and Noncorporate Entities, Does Not Deny The State Chamber Equal Protection Of The Law	11
B. The Campaign Act's Media Exemption, MCL § 169.206(3)(d), Does Not Deny The State Chamber Equal Protection Of The Law	20
CONCLUSION	26

TABLE OF AUTHORITIES

Cases **Page**

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ... 13

Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465; 242 N.W.2d 3 (1976) ... 18

Athens Lumber Co v. FEC, 689 F.2d 1006 (11th Cir. 1982) 718 F.2d 363 (11th Cir. 1983) cert den, 465 U.S. 1092 (1984) ... 24

Board of Trustees of State University of New York v. Fox, 109 S. Ct. 3028 (1989) 7

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8,9,10

Buckley v. Valeo, 424 U.S. 1 (1976) 21

California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981) 14

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) 13

Page

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 9

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 22

FEC v. Phillips Publishing Co, 517 F. Supp. 1308 (D. D.C., 1981) 22

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) .....passim

Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 4

Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982) 3,15,19

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 1,2

New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988) 8

People v. Gansley, 191 Mich. 357; 158 N.W. 195 (1916) 17

Reader's Digest Association v. FEC, 509 F. Supp. 1210 (S.D., N.Y., 1981) 22

Page

Statutes

2 U.S.C. § 431(9)(B)(i) 21-23

2 U.S.C. § 441b(a) 2,23

MCL § 169.206(3)(d) 20,21,22

MCL § 169.254(1) 1,26

Court Rules

Sup. Ct. R. 34.1(a) 12

Other Source

R. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE 363-368 (6th ed. 1986)... 12

ARGUMENT

I.

THIS CASE IS GOVERNED BY FEDERAL ELECTION COMMISSION V. MASSACHUSETTS CITIZENS FOR LIFE, INC.

The cornerstone issue to be resolved in this case is whether the Court of Appeals erred in striking down Mich. Comp. Laws Ann. ("MCL") § 169.254(1) (West 1989 Supp.), on the basis of this Court's holding in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL"), 479 U.S. 238 (1986). The State Chamber's Brief strives to disregard MCFL and primarily relies on the holding in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), involving a complete prohibition against corporate expenditures and contributions in connection with state

referenda.[1] Of course, in Bellotti, the Court "did not consider the validity of laws, like [2 U.S.C.] § 441b, aimed at the threat of corruption in candidate elections." MCFL, 479 U.S. at 270, n. 2 (Rehnquist, C. J., dissenting). (Emphasis in original.) The Court recognized, however, that in candidate elections, unlike referendum votes concerning general public interest issues, there well may be a threat "of real or apparent corruption in independent expenditures by corporations to influence elections." Bellotti, 435 U.S. at 788, n. 26.

These concerns acknowledged in Bellotti are fully consistent with the

---

1 See Brief of Appellee at 8, 9, 15, 24-26, and 36.

concerns expressed in MCFL regarding independent expenditures by corporations. While the Court created a narrow exception to the general principle permitting state regulation of corporate political activity, the Court reaffirmed two compelling interests served by the regulation of corporate electoral activity; curbing the use in elections of "the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization,'" 479 U.S. at 257, quoting Federal Election Comm'n v. National Right to Work Committee, ("NRWC"), 459 U.S. 197, 207 (1982), and "prevent[ing] an organization from using an individual's money for purposes that the individual may not support." MCFL, 479 U.S. at 260.

These compelling interests apply to the State Chamber, a non-profit, multi-purpose, conduit corporation, for the reason that it more closely resembles the type of "'traditional corporatio[n] organized for economic gain'. . .that has been the focus of regulation of corporate political activity." MCFL, 479 U.S. at 259, quoting Federal Election Commission v. National Conservative Political Action Committee, ("NCPAC"), 470 U.S. 480, 500 (1985). Because the State Chamber is a "conduit for the type of direct spending that creates a threat to the political marketplace", MCFL, 479 U.S. at 264, it, therefore, poses "a threat of the danger that has prompted regulation." MCFL, 479 U.S. at 263.

Furthermore, the exception for non-profit ideological corporations which

this Court fashioned in MCFL is clearly not applicable to the State Chamber. Indeed, the State Chamber's Brief does not even pretend to claim that it possesses the three characteristics or features of MCFL which this Court found "essential to our holding." MCFL, 479 U.S. at 263. Of course, it would be an exercise in futility because: 1) In contrast to MCFL, the State Chamber has economic resources which are unrelated to its political support; 2) It has significant business purposes which create disincentives for its members to disassociate themselves even if they disagree with the State Chamber's political activities, and; 3) The State Chamber accepts corporate money from its 6,000 corporate members in the form of dues. Thus,

unlike MCFL, the State Chamber and other incorporated non-profit conduits have the ability to act as conduits for profit-making corporations and circumvent the basic prohibition on corporate spending. In contrast to MCFL, the State Chamber is not entitled to an "unfair advantage in the political marketplace". MCFL, 479 U.S. at 257.

The State Chamber is not an ideological advocacy corporation in the mold of MCFL. The Court of Appeals erred in declaring Section 54(1) unconstitutional pursuant to the holding in MCFL.

II.

SECTION 54(1) IS NOT SUBSTANTIALLY OVERBROAD.

The State Chamber and its amici argue that even if Section 54(1) is constitutional as applied to the State Chamber, the Court should strike down the statute as overbroad.[2] Since the Court below did not address this issue, it should be addressed, if at all, only on remand. See Board of Trustees of State University of New York v. Fox, 109 S. Ct. 3028 (1989) (remanding to Court of Appeals for determination of overbreadth challenge to state statute).

In any case, the State Chamber's overbreadth challenge is meritless. As

---

2 See Brief of Appellee at 19-21.

this Court has made clear, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234 (1988), quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).[3] When considering an overbreadth challenge, this Court has held that "it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state

---

3 Moreover, overbreadth analysis is an exception to traditional rules of standing and ripeness which require that the party before the court be actually injured in a way that entitles the party to relief. See Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) ("under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws").

regulatory program." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

In Broadrick v. Oklahoma, supra, the Court specifically addressed the applicability of the overbreadth doctrine to regulations designed to prevent political corruption and the appearance of corruption. In such a situation, the statute is only unconstitutional if it is "substantially overbroad" when "judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. In MCFL, 479 U.S. at 257, the Court left no doubt that a state may regulate "the corrosive influence of concentrated corporate wealth" on the political system by limiting corporate independent

expenditures.[4]

Therefore, whatever overbreadth may exist in Section 54(1) "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied," Broadrick v. Oklahoma, 413 U.S. at 615-616, rather than through an overbreadth challenge by a party whose conduct is within the "hard core" of what the statute may lawfully proscribe. Id. at 608.

---

4 Notably, the Court in MCFL did not find overbroad § 441b of the Federal Election Campaign Act, which is in its essentials identical to the Michigan statute.

III.

SECTION 54(1) OF THE CAMPAIGN ACT IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Section 54(1), Which Distinguishes Between Corporate Entities and Noncorporate Entities, Does Not Deny The State Chamber Equal Protection Of The Law.

The State Chamber and various amici advance the erroneous argument that Section 54(1) of the Campaign Act denies them equal protection of the law because corporations are subject to the prohibition from making independent expenditures in candidate elections while labor unions are not subject to the ban.[5] Since Appellants did not raise this issue in

---

5 See Brief of Appellee at 31-40.

both their brief on the merits and jurisdictional statement, and since the Sixth Circuit did not address it, it is not properly before this Court. Sup. Ct. R. 34.1(a). See R. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE 363-368 (6th ed. 1986).

Nevertheless, the State Chamber's claim is without merit because it attempts to set up a false dichotomy. Section 54(1) does not distinguish between corporations and labor organizations. The District Court found that Section 54(1) only "distinguishes between corporations and non-corporate persons or entities. [It]. . .does not distinguish between corporations and labor unions." (J. S. App. 71a.) Any organization such as a business trust, partnership or labor

organization, which chooses to adopt the corporate form is subject to the same restrictions that are placed on all corporations, including the State Chamber.[6] (J. A. 178a-184a.) Conversely, any unincorporated organization which chooses the non-corporate form is not subject to the restriction.

Moreover, there is nothing in constitutional jurisprudence which requires

---

6 The Michigan Education Association, an incorporated labor union, is subject to the same restrictions on independent expenditures as the State Chamber. Conversely, the UAW, an unincorporated labor union, is not. However, the UAW and all other unincorporated unions which are not covered by Section 54(1) are subject to significant constitutional restrictions on their ability to use their funds for political purposes in contravention of the wishes of their dissenting members. See Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

that unequals be treated equally, or even that they be dealt with simultaneously, and legislative judgments in that regard are entitled to great deference:

> While business corporations may not represent the only organizations that pose [a] danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the 'careful legislative adjustment of the federal electoral laws, in a "cautious advance, step by step,"' to which we have said we owe considerable deference. (Citations omitted).
> MCFL, 479 U.S. at 258-259, n. 11.

In California Medical Association v. Federal Election Commission, 453 U.S. 182, 201 (1981), this Court accepted the "judgment by Congress that. . .entities

hav[ing] different structures and purposes. . .may require different forms of regulation in order to protect the integrity of the electoral process." See also NRWC, 459 U.S. at 210.

The statute at issue, Section 54(1), places a complete ban on independent expenditures by all corporations. The statutory provision does not differentiate between non-profit and for-profit corporations, nor between ideological and commercial corporations. Since the statute treats all corporations in a like manner, Section 54(1) does not invidiously discriminate against any group.

The legislative history of Section 54(1) demonstrates that the Legislature had a compelling interest in limiting the

political contributions and expenditures by corporations. The first legislative effort in this area was the enactment of the Corrupt Practices Act.[7] Section 14 of the Act, which banned the use of corporate funds for the payment of election expenses, stated:

> No officer, director, stockholder, attorney, agent or any other person, acting for any corporation or joint stock company, whether incorporated under the laws of this or any other state or any foreign country, except corporations formed for political purposes, shall pay, give or lend, or authorize to be paid, given or lent, any money belonging to such corporation to any candidate or to any political committee for the payment of any election expenses whatever.

The purpose of such a ban was noted by the Michigan Supreme Court in People

---

7 1913 Mich. Pub. Acts 109.

v. Gansley, 191 Mich. 357, 376; 158 N.W. 195, 201 (1916):

> It is probable that the legislature had in mind the fact that it is a matter of history that corporations have in many instances used their funds (acting through and by their officers) to influence elections, and that body believed that such practice was an abuse and menace to good government, which it sought to remedy by this legislation. The record, in our opinion, is a justification for the legislation complained of.
>
> * * *
>
> It was for the legislature to say, in the exercise of the police power, whether such use of corporate funds opened the door to corruption and tended to destroy safeguards sought to be placed around elections to 'protect the purity of the ballot.' . . .

More than sixty years later, the Michigan Supreme Court reaffirmed those governmental interests, concluding:

> The legislative intent in prohibiting financial involvement of corporations in the elective process was to pre-

vent the use of corporate funds to impose undue influence upon elections. Large aggregations of capital controlled by a few persons could have a significant impact upon the nomination or election of a candidate. The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected candidate by a contributing corporation represent abuses which the passage of the corrupt practices act sought to eliminate.

> Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 492; 242 N.W.2d 3, 13 (1976) (Footnote omitted).

The Legislature has long considered large-scale election activity by corporations to pose special problems. The Legislature concluded that corporations' aggregations of wealth presented such disruptive power and influence in connection with state candidate elections that prohibitions on contributions, expen-

ditures and independent expenditures were justified.[8] The statutory ban "reflects a legislative judgement that the special characteristics of the corporate structure require particularly careful regulation", NRWC, 459 U.S. at 209-210.

In its efforts to reform the political process by imposing tightly drawn restrictions on corporations, the Legislature has not committed constitutional error by not treating individuals or other organizations differently. Indeed, the Legislature might well have concluded that all organizations pose

---

[8]Similarly, the laws of a least twenty states prohibit both contributions and expenditures by corporations in support of candidates in state elections. See Jurisdictional Statement of Appellants at 16, n. 13.

such a similar threat of abuse that they should all fall within the same restrictions as corporations. The Legislature, however, did not. The Constitution does not require that the Legislature treat corporate entities and non-corporate entities in the same manner. See MCFL, 479 U.S. at 258-259, n. 11.

B. The Campaign Act's Media Exemption, MCL § 169.206(3)(d), Does Not Deny The State Chamber Equal Protection Of The Law.

Finally, the exemption for media corporations is not violative of equal protection. MCL § 169.206(3)(d) exempts from the reach of the statute:

> An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or in opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting.

In MCFL, 479 U.S. at 250, the Court examined 2 U.S.C. § 431(9)(B)(i), the federal counterpart of MCL §169.206(3)(d), and noted that the corporate media exemption was designed to:

> 'make it plain that it was not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.' H.R. Rep. No. 93-1239, p. 4 (1974).

Similarly, in Buckley v. Valeo, 424 U.S. 1, 93 n. 127 (1976), the Court noted that special protections for the news media, like § 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media. . . and preferential postal rates and antitrust exemptions for newspapers.

See also FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

Thus, despite the State Chamber's assertions to the contrary, MCL § 169.206(3)(d) only recognizes the First Amendment right of the media to freely publish "any news story, commentary, or editorial".

In FEC v. Phillips Publishing Co, 517 F. Supp. 1308, 1313 (D. D.C., 1981), the Court examined 2 U.S.C. § 431(9)(B)(i), and gave no indication that it discriminated arbitrarily and unreasonably against nonmedia corporations in violation of the First and Fifth Amendments. Likewise, in Reader's Digest Association v. FEC, 509 F. Supp. 1210 (S.D., N.Y.,

1981), the Court concluded that dissemination of a tape for the purposes of publicizing the magazine would fall within the press entity's legitimate function, and would be covered by the media exemption. Again, no indication was given that the corporate media exemption was unconstitutional. In fact, the Courts have never held that a statute which treats some press activities differently than non-press activities is a violation of equal protection.

It was undoubtedly for the foregoing reasons that the en banc 11th Circuit unanimously rejected the similar argument that "the provisions of 2 U.S.C. § 441b(a), together with the provisions of 2 U.S.C. § 431(9)(B)(i), discriminate arbitrarily and unreasonably in violation

of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other". Athens Lumber Co v. FEC, 689 F.2d 1006, 1016 (11th Cir. 1982) (certifying issues to the Eleventh Circuit Court of Appeals en banc), 718 F.2d 363 (11th Cir. 1983) (en banc) (answering certified questions in the negative), cert den, 465 U.S. 1092 (1984).

Like the Eleventh Circuit, this Court should conclude that, far from an unconstitutional discrimination between similar entities, the Campaign Act's media exemption is a proper legislative effort to accomplish the important

governmental interests served by the Act without unduly burdening the media in its coverage of state election campaigns.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals that MCL § 169.254(1) is unconstitutional as applied to the Michigan State Chamber of Commerce should be reversed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Thomas L. Casey
Assistant Solicitor General

Gary P. Gordon
Richard P. Gartner
Assistant Attorneys General

Attorneys for Appellants